

SINGAPORE REPORTS

GOH SWEE HOON & ANOR. v. EWINGS
(AUSTRALIA) PTY. LTD.[C.A. (Wee Chong Jin C.J., Lai Kew Chai & Chua JJ.)
August 24, 1987]

[Singapore – Civil Appeal No. 6 of 1987]

*Contract – Guarantee – Summary judgment sought –
Defences shadowy and have no merits.**Practice and Procedure – Summary judgment –
Appeal – Defences shadowy and have no merits – Appeal
dismissed – R.S.C. 1970, O.14.*

The plaintiffs claimed that on September 9, 1983, the defendants each executed a guarantee to the plaintiffs whereby in consideration of the plaintiffs providing credit facilities to Worldwide Mercantile Development Private Limited ("the Principal Debtor"), the defendants guaranteed to the plaintiffs, *inter alia*, payment on demand of all moneys and liabilities due and payable by the Principal Debtor upon any account or in any manner whatsoever. As at September 11, 1984, an amount of \$648,783.26 was due and owing by the Principal Debtor to the plaintiffs and as the Principal Debtor had failed to pay the amount, the plaintiffs claimed against the defendants as the guarantors. The plaintiffs applied for summary judgment under Order 14 of the Rules of the Supreme Court. At the conclusion of the hearing, the learned Deputy Registrar gave the defendants leave to defend on condition that they furnished security by way of a banker's guarantee for an amount of \$300,000 within 21 days. The defendants appealed. On appeal the defendants raised two offences.

- (a) that the two guarantees were not executed and were never executed by the defendants in favour of the plaintiffs; and
- (b) if there were such guarantees executed by the defendants, they were given for past consideration.

The appeal was dismissed by the learned Judge. His Lordship found the *bona fides* of the defendants in relation to the first defence very dubious and that the first defence was shadowy. His Lordship also held that the second defence had no merits. The defendants made a further appeal to the Court of Appeal.

Held, dismissing the appeal: the learned Judge was right in his view that the defence was shadowy and that there was no merit in the defence of past consideration.

HIGH COURT.

Cheong Yuen Hee (Andrew Chua with him) for the plaintiffs.

Lim Hin Chye for the defendants.

Cur. Adv. Vult.

Thean J.: The plaintiffs claim that on September 9, 1983, the defendants each executed a

- A guarantee to the plaintiffs, whereby in consideration of the plaintiffs providing credit facilities to Worldwide Mercantile Development Private Limited ("the Principal Debtor"), the defendants guaranteed to the plaintiffs, *inter alia*, payment on demand of all moneys and liabilities due and payable by the Principal Debtor upon any account or in any manner whatsoever. As at September 11, 1984, an amount of \$648,783.26 was due and owing by the Principal Debtor to the plaintiffs and as the Principal Debtor had failed to pay the amount, the plaintiffs claimed against the defendants as the guarantors. The plaintiffs applied for summary judgment under Order 14 of the Rules of the Supreme Court, and at the conclusion of the hearing, the learned Deputy Registrar gave to the defendants leave to defend on condition that they furnished security by way of a banker's guarantee for an amount of \$300,000 within 21 days. Against that decision, this appeal was brought, and at the conclusion of the hearing of the appeal, I dismissed it with costs.

- E Before me, Mr. Lim on behalf of the defendants raised two defences, namely, (a) the two guarantees dated September 9, 1983 ("the 1983 Guarantees"), and exhibited as "A" in the Affidavit of Yap Boh Pin affirmed on August 12, 1985, were not executed, and were never executed, by the defendants in favour of the plaintiffs, and (b) if there were such guarantees executed by the defendants, they were given for past consideration.

- F On the first defence, the defendants admitted that they each executed a guarantee, and the two guarantees both dated February 21, 1984 ("the 1984 Guarantees"), were issued to three companies, namely. (i) Ewing McDonald (Hong Kong) Limited, Hong Kong, (ii) Ewing McDonald (S.E. Asia) Limited, Hong Kong, and (iii) Ewing McDonald (Singapore) Pte. Ltd., Singapore, and the names of the other three companies, namely: (i) J.A. Ewing & McDonald Inc., New York, (ii) J.A. Ewing & Company (London) Limited, London, and (iii) Ewing (Australia) Pty. Ltd., Sydney, were expressly deleted. Copies of the 1984 Guarantees were exhibited in the affidavits of the 1st and 2nd defendants affirmed on January 23, 1986 and November 28, 1985, respectively.

- I Further, in his first affidavit affirmed on January 23, 1986, and also in his subsequent affidavit affirmed on March 6, 1986, the 1st defendant alleged that the Principal Debtor had business dealings with the predecessor of the plaintiffs, namely, D. & J. Fowler (Australia) Ltd., for which the defendants were not required to execute any per-

sonal guarantees, and that in June 1983 the plaintiffs took over the business from D. & J. Fowler (Australia) Ltd. and that since July 1, 1983, the plaintiffs had continued to extend credit facilities to the Principal Debtor, notwithstanding that the defendants did not give any personal guarantees to the plaintiffs.

Yap Boh Pin, the representative of the plaintiffs, refuted the allegation of the 1st defendant that no personal guarantees were required by the plaintiffs. He produced and exhibited copies of contemporaneous documents which show that guarantees were required from, and were executed by, the defendants. They are as follows:

- (a) By a letter of July 13, 1983 (Exhibit "YBPI"), written to the 1st defendant, the plaintiffs set out the terms on which the plaintiffs' Board had approved the facility to be granted to the Principal Debtor and one of the terms or conditions governing the use of the facility was the execution of personal guarantees by the defendants. That letter was accepted and signed by the 1st defendant.
 - (b) By a telex dated September 7, 1983 (Exhibit "YBP2"), from the plaintiffs to their associated or affiliated company in Singapore, the plaintiffs insisted that no further letter of credit would be established until the Singapore office had confirmed that, *inter alia*, the personal guarantees of the defendants had been received.
 - (c) According to a letter dated September 12, 1983 (Exhibit "YBP-3"), written by the plaintiffs' associate or affiliate in Singapore, the guarantees executed by the defendants were forwarded to the plaintiffs.
 - (d) According to two letters dated September 14, and September 22, 1983 (Exhibits "YBP4" and "YBP5"), the plaintiffs sent copies of the guarantees to their associated or affiliated companies in Johannesburg and London respectively.
- A similar in all respects to the 1983 Guarantees and it was given strictly in favour of "Ewing McDonald (Singapore) and Ewing McDonald (Hong Kong)." He said:
- "9. However I did give him a signed guarantee that appeared similar in all respects to the exhibit "A" except that the one that was given to him was undated and was strictly given in favour of Ewing McDonald Singapore and Ewing McDonald Hong Kong. In other words, the first three beneficiaries named in the said guarantee were cancelled in the same manner as the exhibit marked "GSH-1" annexed in my Affidavit filed on the 23rd day of January 1986.
10. At the time when I gave Yap the undated signed guarantee, he had promised to keep me informed and would fix the date on the said undated guarantee and return a copy thereof for my keeping as soon as he had secured an insurance coverage for the Company to purchase gold in Singapore and Hong Kong instead of Australia through Ewing McDonald Singapore and Ewing McDonald Hong Kong.
11. Furthermore Yap said that he would not send the undated signed guarantee to Australia but would keep it with him in Singapore for the purpose of applying insurance coverage from the Export Insurance Authority of Singapore to enable the Company to purchase gold in Singapore. However he never did."
- I find it extremely odd as to why these allegations were not filed in his first affidavit on January 23, 1986. There was no suggestion by the defendants, and in particular the 1st defendant, at that time that the 1984 Guarantees were undated and were executed and were delivered to Yap Boh Pin earlier than that date. The defendants have clearly shifted their stand.
- There is one last point which should be mentioned. The 1st defendant on behalf of the Principal Debtor applied for credit facility for purchase of gold in or from Singapore and Hong Kong but this application was refused, and there is no reason why personal guarantees should be given by the defendants to associated or affiliated companies of the plaintiffs in Singapore and Hong Kong, namely: Ewing McDonald (Hong Kong) Limited, Ewing McDonald (S.E. Asia) Limited, and Ewing McDonald (Singapore) Private Limited. No purchase of gold was made by the Principal Debtor in or from Singapore or Hong Kong for which any of these companies had given credit facility. The amount claimed in this case arose out of a transaction of purchase of gold from Australia for which the plaintiffs granted to the Principal Debtor a credit facility.

All these documents establish cogently that at least by the end of September 1983, the defendants had executed and delivered to the plaintiffs the personal guarantees and lend support to the claim that the 1983 Guarantees in favour of the plaintiffs had been executed and delivered.

Confronted with these documents, the 1st defendant then took a different stand. In his affidavit affirmed on April 16, 1986, he said that he gave to Yap Boh Pin an undated guarantee

For all these reasons, I find the *bona fides* of the defendants in relation to the first defence very dubious, and agree with Mr. Cheong for the plain-

tiffs that the first defence put up by the defendants is shadowy. As for the second defence, *i.e.* the defence of past consideration, I find it has no merit whatsoever. The line of credit might have been in existence at the time when the guarantees were given, but the facilities in respect of which the debt arose were granted after the execution of the guarantees. Clearly, there was consideration for the guarantees executed by the defendants.

For all these reasons, the learned Deputy Registrar was justified in imposing the condition, as he did, in granting leave to the defendants to defend the claim. The appeal therefore failed.

[The defendants appealed to the Court of Appeal.]

COURT OF APPEAL.

R. Joethy for the appellants.

Cheong Yuen Hee (*Andrew Chua* with him) for the respondents.

Wee Chong Jin C.J. (delivering the judgment of the Court): This appeal arises from a claim made by the plaintiffs/respondents against the defendants/appellants for the sum of \$648,783.26 alleged to be due under two personal guarantees executed on September 9, 1983, by each of the appellants who, in consideration of the respondents providing credit facilities to Worldwide Mercantile Development Private Ltd. ("the Principal Debtor"), guaranteed to the respondents, *inter alia*, payment on demand of all moneys and liabilities due and payable by the Principal Debtor upon any account or in any manner whatsoever.

On the application of the respondents for summary judgment under Order 14 of the Rules of the Supreme Court, the Deputy Registrar gave to the appellants leave to defend on condition that they furnished security by way of a banker's guarantee for an amount of \$300,000 within 21 days. On appeal by the appellants to a Judge in Chambers, Thean J. dismissed it with costs.

The appellants appealed to the Court of Appeal. At the conclusion of the hearing we dismissed the appeal with costs and we now give our reasons.

The defence of the appellants was that the two guarantees dated September 9, 1983, were not executed and were never executed by them in favour of the respondents and if there were such guarantees executed by them, they were given for past consideration.

A In our view, the learned Judge was correct, on the affidavit evidence before him, to conclude that the appellants had shifted their stand in their defence and that the defence was shadowy.

B The original stand of the appellants was that they never executed any guarantees before February 21, 1984. They admitted that they each executed a guarantee dated February 21, 1984, but they were not in favour of the respondents' subsidiary companies in H.K. and Singapore.

C The appellants also contended that the Principal Debtor had business dealings with the predecessor of the respondents, D. & J. Fowler (Australia) Ltd for which the appellants were not required to execute any personal guarantees and that in June 1983 the respondents took over the business from D. & J. Fowler Ltd and since July 1, 1983, the respondents had continued to extend credit facilities to the Principal Debtor, notwithstanding that the appellants did not give any personal guarantees to the respondents.

E However, when confronted with contemporaneous documents which showed that guarantees were required from and were executed by the appellants at least by the end of September 1983, the appellants then took a different stand.

F The first appellant alleged that he gave to Yap Boh Pin, the Singapore representative of the respondents, an undated guarantee similar in all respects to the guarantee dated September 9, 1983, but it was given strictly in favour of the respondents' subsidiary companies in H.K. and Singapore. It was suggested that the first pages were switched by the respondents. The appellants had clearly shifted their stand. Further, there was no evidence to show that the Principal Debtor had dealt with the said H.K. and Singapore subsidiaries of the respondents. There was accordingly no commercial substratum to give substance to the appellants' allegations.

H We are of the view that the learned Judge was right in his view that the defence was shadowy and that there was no merit in the defence of past consideration.

I We accordingly dismissed the appeal.

Appeal dismissed.

Solicitors: *Joethy & Co.; Tan Kim Seng & Partners.*